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No. 90-1912

# In the Supreme Court of the United States

October Term, 1990

STEPHANIE NORDLINGER,

*Petitioner,*

v.

KENNETH HAHN, in his capacity as  
Tax Assessor for Los Angeles County  
and the COUNTY OF LOS ANGELES,*Respondents.*PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA

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## REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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## REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

This Court has recently determined in granting certiorari in a similar and closely related case, *R.H. Macy & Co., Inc. v. Contra Costa County*, No. 90-1603, *cert. granted* 59 U.S.L.W. 3809, *cert. dismissed* 111 S.Ct. 2923 (1991) ("*Macy's*"), that the constitutionality of Proposition 13's assessment method is an unresolved and important federal question. When this Court struck down the Webster County, West Virginia "welcome stranger" property tax method at issue in *Allegheny Pittsburgh Coal Co. v. County Commission*, it expressly recognized that its decision cast doubt on the validity of California's Proposition 13. 488 U.S. 336, 344 n.4 (1989). The Court left open for another day, however, the determination of Proposition 13's constitutionality. When that day arrived and *Macy's* reached the Court, the Court granted certiorari. *Macy's*, however, soon determined that it did not wish "to become the agent for change on this important public policy issue," *Los Angeles Times*, June 8, 1991 at 1, and withdrew its petition for certiorari on June 28, 1991.

This case is the second Proposition 13 challenge to reach the Court. Despite the Court's clear indication—through its granting of the *Macy's* petition—that the constitutionality of Proposition 13 remains unresolved, respondents inexplicably argue that "the property tax classification system in . . . [Proposition 13] presents no new or special constitutional issues or important reasons for granting . . . certiorari." Respondents' Brief in Opposition ("Resp. Br.") at 6. Respondents are incorrect. The new question presented in this case is whether a state by legislative enactment can systematically and intentionally shift an ever-increasing amount of its property tax burden away from longtime property owners and onto newcomers. The question is *important* both because such a policy has been adopted by the largest state in the Union, and because, absent a ruling striking down such a taxing provision, the political



irresistibility of shifting taxes onto newcomers will likely tempt other states across the country to adopt similar schemes.

Respondents seek, unsuccessfully, to distinguish this case from the *Macy's* challenge in two respects. First, they argue that "[t]he petition in *Macy's* was carefully limited to commercial property." Resp. Br. at 6. This case, on the other hand, contains no such limitation. Although petitioner Stephanie Nordlinger is a residential property owner, her proposed second amended complaint alleges widespread disparities among all types of properties, including commercial property, residential income property, and vacant lots, as well as residences. II J.A. at 270-272. She thus seeks a declaratory judgment that the welcome stranger provision of Proposition 13 is unconstitutional "insofar as it requires that owners of similarly situated property be taxed disparately." See II J.A. at 275. This case is simply more inclusive than *Macy's*, not distinguishable, and will resolve for all property types the question of Proposition 13's constitutionality.<sup>1</sup>

Respondents next attempt to distinguish this case from *Macy's* by attacking the record upon which this case is based. See, e.g., Resp. Br. at 3 ("[t]he amount and degree of disparities offered by Petitioner as fact are essentially nothing more than conjecture"). Respondents' attack flies in the face of overwhelming evidence presented by petitioner (on behalf of her proposed second amended complaint) of gross inequities in the taxation of similarly situated property,

<sup>1</sup>Indeed, R. H. Macy's attempt to limit its challenge to commercial property only was itself inconsistent with Proposition 13, which does not create a split assessment roll by distinguishing among types of property. As respondents argued to the court of appeal below, "Proposition 13 reflects [a] policy choice [against a split roll], and treats residential and commercial properties the same." Los Angeles County's Response to Amicus Curiae Brief of Charles Ajalat at 3. Apparently recognizing that its case at least indirectly would affect residential property, Macy's withdrew its certiorari petition. See Los Angeles Times, June 8, 1991 at 1 (quoting Macy's statement that "there is no way to guarantee that pursuing [the Macy's challenge] through the courts may not ultimately have some effect on homeowners").

evidence so convincing that the court of appeal below relied on it to take judicial notice of the inequalities. The court concluded that "it is not reasonably disputable that article XIII A has resulted in gross disparities in the assessments of properties with similar current market values . . . ." *Nordlinger*, 225 Cal.App.3d at 1271, 275 Cal.Rptr. at 690. The court below further characterized petitioner Nordlinger's studies as providing ". . . ample evidence of the distortions created by Proposition 13. . . ." *Id.* at 1268, 275 Cal.Rptr. at 688.<sup>2</sup>

Furthermore, the legal posture of this case, which exists because of respondents' own action in successfully demurring

<sup>2</sup>Indeed, counsel for respondents in the court of appeal below expressly characterized the gross disparities established by petitioner's evidence as "shocking"—evidence that, as in the *Macy's* challenge, is derived in the main from the Assessor's own computerized records of property tax assessments. Though respondents attempt to portray petitioner's comprehensive studies as somehow statistically insignificant and unrepresentative of property throughout Los Angeles County, the 10,000 sales considered in the County-Cross Section study represent every residential sale in the entire county during the month of August, 1989. Moreover, respondents presented as an exhibit to their brief in the court of appeal below their own evidence of property tax disparities in Los Angeles County. The evidence is remarkably consistent with the data included in both the *Macy's* study and petitioner's study. All data show that by 1989, just 11 years after Proposition 13 was enacted, the average disparity between new and long-time homeowners had already reached 5:1. Respondents' own exhibit also shows that by 1989 the average disparity throughout much of the county was 7:1, and in Beverly Hills had reached 10:1. The differential appreciation rates between Los Angeles' wealthy and gentrifying neighborhoods, which have seen rapid real estate appreciation, and its slower-growing impoverished areas helps explain why petitioner's County Cross-Section Study identified more than 30 distinct regions where the disparities had reached 10:1 or more.

Respondents even question various other allegations derived directly from such universally respected sources as the government's Consumer Price Index (the basis for the allegation that pre-1978 owners paid 61% more on their first post-Proposition 13 tax bills than they do today) and the Census (the basis for the allegations that many movers do so out of necessity).

to petitioner's First Amended Complaint, requires both this Court and respondents to assume that petitioner's allegations are true. See, e.g., *Rader Co. v. Stone*, 178 Cal.App.3d 10, 20, 223 Cal.Rptr. 806, 809 (1986). Respondents' attack on the record is legally inappropriate.<sup>3</sup>

The remainder of Respondents' arguments are aimed at convincing this Court that, on the merits, Proposition 13

<sup>3</sup>Respondents' belated contention that "the record . . . does not provide an adequate basis to permit a review of Proposition 13," Resp. Br. at 10, is belied by their own words to the court of appeal below. There, they urged the court to determine Proposition 13's constitutionality with the case on demurrer because "a remand for an evidentiary hearing . . . serves no purpose as the core issues here concern law and policy." See Los Angeles County's Response to Amicus Curiae Brief of Charles Ajalat at 4. Respondents' contention also ignores this Court's own actions in frequently deciding important constitutional questions on demurrer (or its procedural equivalent). See e.g., *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 901 (1986) (appellants state a claim that New York's civil service preference for veterans who resided in New York when they entered U.S. Armed Forces violates the equal protection clause); *Williams v. Vermont*, 472 U.S. 14 (1985) (appellants state a claim that Vermont automobile use tax is unconstitutional as applied to recent residents).

Respondents' suggestion that the Court should reject this petition for certiorari because the factual allegations have not been proven would leave Proposition 13 essentially immune from constitutional attack. Although the county defendant in *Macy's* stipulated to an evidentiary record, in future cases no defendant would do the same if it could avoid Supreme Court review simply by demurring to a complaint. It is clear that California courts would sustain any such demurrer absent a ruling from this Court. See, e.g., *Nordlinger v. Lynch*, 225 Cal.App.3d 1259, 275 Cal.Rptr. 684 (1990), rev. den. Feb. 28, 1991; *R.H. Macy & Co. v. Contra Costa Co.*, 226 Cal.App.3d 352, 276 Cal.Rptr. 530 (1990), rev. den. Feb. 28, 1991, cert. granted 59 U.S.L.W. 3809, cert. dismissed 111 S.Ct. 2923; *Northwest Financial, Inc. v. State Board of Equalization*, 229 Cal.App.3d 198, 280 Cal.Rptr. 24 (1991), rev. den. July 11, 1991 (where in each case the state court of appeal found itself bound by the state supreme court's *Amador Valley* ruling upholding Proposition 13 and where the state supreme court denied requests for review).

is constitutional. They provide no reason to deny the petition for certiorari in the face of this Court's clear interest in resolving the important federal questions raised.

**1. Classification.** Respondents spend much of their brief arguing about the indisputable power of states to classify citizens for taxation purposes. Nowhere, however, do they describe for the Court the classes that Proposition 13 ostensibly creates. Indeed, respondents even argue that "all purchasers of property are treated the same under Article XIII A's classification system." Resp. Br. at 13-14. If that is the case, Proposition 13 does not classify taxpayers at all, yet clearly discriminates unconstitutionally against recent purchasers of property who, although subject to the "same" assessment rules as long-time owners of comparable property, pay far more in taxes.

Respondents have previously characterized the welcome stranger provision as creating a new assessment class "each day." Respondents' Brief, filed in the court of appeal, at 10. By this description, starting with the 1975 base year, Proposition 13 has already created more than 5,800 classes and will henceforth add another 365 annually. This Court has soundly rejected the creation of "expanding numbers of permanent classes." *Zobel v. Williams*, 457 U.S. 55, 64 (1982). Moreover, it has held that a classification scheme "must reflect preexisting differences; it cannot create new ones that are supported only by their own bootstraps." *Williams v. Vermont*, 472 U.S. 14, 27 (1985). Proposition 13 violates both the *Zobel* and *Williams* proscriptions. It creates ever expanding permanent classes based not on any preexisting differences among the various classes, but on differences created by Proposition 13's own discriminatory assessment scheme.

Petitioner does not suggest that states lack the power to classify taxpayers, nor that "all taxes on property must be based on a current market value system to meet the



requirements of the Equal Protection Clause.”<sup>4</sup> Resp. Br. at 14. But this case raises an altogether different question: once a state adopts an *ad valorem* property tax system that uses market value to establish initial property tax assessments, as California has, can it artificially cap annual increases in assessments, so that long-time owners pay taxes on outdated values, while new buyers must pay vastly higher taxes on the full value of comparable properties? The only criterion for who gets the favored low assessments and who gets the harsh high assessments is who was lucky enough to be here first and could afford to be in the market when values/prices were low. As this Court stated in *Allegheny*, “the fairness of one’s allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings.” 488 U.S. at 346. California’s welcome stranger scheme clearly departs from this fundamental constitutional principle.

**2. Justifications for the discrimination.** Respondents baldly assert that *Allegheny*’s requirement to seasonably achieve a rough equality in the taxation of owners of comparable property does not apply to California for the simple reason that Webster County adopted its welcome stranger scheme administratively, whereas California enacted its legislatively. Petitioner agrees that the distinction between the two systems exists. See Petition for Writ of Certiorari (“Petition”) at 13. Of course, the question facing this Court, and the question respondents fail to address, is *why* California should be permitted to do by legislation what Webster County is prohibited from doing administratively.

Without ever addressing this fundamental question, respondents then attempt, unsuccessfully, to justify Proposition 13’s grossly inequitable taxing scheme.

<sup>4</sup>For example, a tax based on a property’s square footage, or on the number of bedrooms per house, or even, as suggested in the petition for certiorari, a tax that assessed all taxpayers, new and old, as of the value of their property in a set base tax year, may well comport with equal protection requirements.

The first proffered justification is that Proposition 13’s so-called “acquisition value approach” allows taxpayers to estimate “with some assurance [their] future tax liability.” Resp. Br. at 17, quoting *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal.3d 208, 235, 149 Cal.Rptr. 239, 251 (1978). But this justification fails to explain why taxpayers are treated *differently*. An equal protection analysis must answer the question “what is the characteristic of the disadvantaged class that justifies the disparate treatment?” *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 453 (1985) (Stevens, J. and Burger, C.J., concurring). The “predictability” justification fails to identify what characteristic newcomers possess that justifies their paying very high predictable taxes when longtimers pay very low predictable taxes.

Respondents also argue that an acquisition value approach “may be said reasonably to reflect the price [a taxpayer] was originally willing and able to pay for his property rather than an inflated [future] value. . . .” Resp. Br. at 18, quoting *Amador*, 22 Cal.3d at 235; 149 Cal.Rptr. at 251. This argument, however, ignores Proposition 13’s central shortcoming. Newcomers, whether they be new residents to the state, new businesses, frequent movers or those too young to have purchased property many years ago, have no ability, though surely a great deal of willingness, to assume the very low taxes (and mortgage payments) available to the longtimers.

In a twist on the second justification, respondents argue that Proposition 13 avoids taxing property owners on “unrealized paper gains” in the value of their property, and hence is a better reflection of ability to pay than assessments based on the current market value of the property. Of course in year one, when a taxpayer first purchases the property, his or her assessment reflects both what he or she was able to pay for the property and its current market value. Evaluating this justification requires examining Proposition

13's operation over time, as the acquisition value of the property and its current value diverge more and more dramatically. This inquiry makes Proposition 13's lack of rationality most apparent. By relying on a real estate transaction that may have taken place sixteen years ago or more to establish, year in and year out, a property owner's tax liability, Proposition 13 utterly eliminates any link between ability to pay and the taxes levied. Indeed, most long-time property owners are typically far *more* able to pay higher taxes sixteen years after their purchase than are recent purchasers.<sup>5</sup>

Certain long-time taxpayers may lack the ability to pay higher taxes than they now pay under Proposition 13. But then again they may not. The point is that a transaction that took place sixteen years ago or more sheds *no* light on whether a taxpayer can presently afford his or her current property taxes. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446.<sup>6</sup>

<sup>5</sup>The mortgage payments of long-time owners as a percentage of income typically have declined dramatically, while their income has increased significantly, and indeed they now own a great deal of equity in the properties they purchased (equity that remains untaxed even when realized). Newcomers, by contrast, typically pay huge mortgage payments on top of huge property taxes, and often own little equity in their recently purchased properties.

<sup>6</sup>Respondents imply that, because commercial property is "income producing," increases in its value are more likely to be accompanied immediately with increases in the property's income. Thus, respondents suggest, commercial property owners have a somewhat better ability to pay increased taxes based on increases in property values under a current market value system than residential property owners do. Resp. Br. at 18-19. If true, this would simply mean that Proposition 13's welcome stranger system is even more constitutionally suspect for commercial properties than it is for residential properties. It is hardly a justification for Proposition 13's discriminatory treatment of newcomers. Furthermore, as with residential taxpayers, this may or may not be the case. Some increases in the value of commercial property translate into immediate increases in income through higher

Respondents also acknowledge the true policy rationale for the change in ownership provision: without reassessing property upon a change in ownership, government would lack the necessary revenue to meet rising costs associated with inflation and population increases. See Resp. Br. at 8. Thus the welcome stranger provision is a convenient mechanism to saddle the newcomer with government's demand for increased revenue (with an added bonus to longtimers, who receive tidy annual tax cuts in real dollars in every year that inflation exceeds Proposition 13's 2% assessment cap). This justification, if allowed to sustain Proposition 13, would allow a state to justify any discrimination by the need for increased governmental revenues, including the very discrimination found unconstitutional in *Allegheny*.

**3. Heightened scrutiny.** The political attractiveness of a welcome stranger method of taxation is undeniable. A majority of current, identifiable voters can vote for themselves perpetually low, even declining taxes while shifting onto an unrepresented, inchoate and ever-changing group of newcomers the bulk of the tax burden. The only consolation for the newcomers is that there will always be an even less fortunate group of future newcomers out there, yet to be identified, who will suffer an even greater tax burden.

It is precisely because of the political irresistibility of shifting the tax burden onto a group that does not even know who it is, let alone onto a group unrepresented in the political process, that requires the application of heightened judicial scrutiny to this case. Respondents seem to argue that because California does not discriminate directly on the basis of

rents. Some increases in the value of commercial property, like a small, owner-operated grocery store, cannot be recouped by the owner until the property is sold. Similarly, some increases in the value of residential property, such as an apartment building, translate into immediate increases in income through higher rents, while some increases in value do not. The point is that the so-called "acquisition value" approach overtime has no connection to a taxpayer's ability to pay.



residency this Court's interstate mobility cases requiring heightened scrutiny do not apply. But Proposition 13, on its face, makes distinctions among taxpayers based on when they purchased their property. And the state's voters in enacting various exceptions to the change in ownership provision, have explicitly acknowledged that Proposition 13 imposes a stiff penalty on mobility by requiring that taxes will increase by 5, 10, or 15 times or more simply because a taxpayer sells one house and buys another of equal or even lesser value.<sup>7</sup> Respondents have offered no principled reason why the constitution should *prohibit* discrimination on the basis of residence per se without a compelling purpose, but should *allow* discrimination on the basis of the timing of purchase of one's residence with virtually no justification, when the parallels between the two forms of discrimination are so stark.

Proposition 13's discriminatory effects are undeniable. New property owners pay many, many times the taxes paid by longtime owners of properties comparable in all respects. This Court has stated that such discrimination, when imposed administratively, cannot withstand constitutional scrutiny. Whether the largest state in the Union can legislatively mandate the very same inequalities is a question that deserves careful judicial review. The Court should grant the petition for certiorari.

Respectfully submitted

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<sup>7</sup>The ballot argument in favor of a successful constitutional amendment that exempted senior citizens who sell and then purchase a home of lesser or equal value from the change in ownership provision stated: "[I]t will allow older Californians the freedom to sell their home and move." Proposition 60 Ballot Pamphlet, Arguments of Proponents (Nov. 1986).

## PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on July 25, 1991, I served the within *Reply To Respondents' Brief In Opposition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 25, 1991, at Los Angeles, California.

Betty J. Malloy  
(Original signed)